**ARAB-MALAYSIAN FINANCE BHD.**

**v.**

**TING PIK KING & ANOR.**

HIGH COURT, SIBU
STEVE L.K. SHIM J.
[ORIGINATING SUMMONS NO. 86]
OF 1992
19 MARCH 1993

***LAND LAW: Private caveat - Priority - First in time - Equitable interest of a contractual nature - Allegation of fraud.***

The registered co-proprietors of two sublots (said land) entered into a Development Agreement with a developer to develop the said land into a residential housing estate. The registered co-proprietors also entered into a Supplementary Agreement with the developer whereby it was agreed *inter alia* that the developer shall be allotted certain sub-lots and shall also be entitled to sell them. On 16 August 1991 a memorandum of charge over the land was created by the registered co-proprietors in favour of the plaintiff in consideration of the plaintiff granting the developer a bridging loan of RM800,000. The memorandum of charge was registered with the land registry.

On or about 10 September 1991, the developer entered into two separate Sale and Purchase Agreements with the defendants in relation to the said land. On the same date, the defendants lodged a caveat over the said land and registered the same. Subsequently, the registered co-proprietors as chargors and the developer as borrower defaulted in payment of the loan. The defendants refused to withdraw the caveat.

**Held:**

**[1]** The charge executed by the registered co-proprietors in favour of the plaintiff was not only first in time but it was duly registered with the Land Registry. This was done before the defendants lodged their joint caveat. The Sale and Purchase Agreements between the developer and the defendants were made subsequent to the creation and execution of the charge in question.

**[2]** As regards the Sale and Purchase Agreements executed between the developer and the defendants, the latter would merely have an equitable interest of a contractual nature in the sublots as against the developer and/or the registered co-proprietors but certainly not as against the plaintiff. The plaintiff being a registered chargee of the land in question and being in the position of a registered proprietor of an interest therein, would have attained an indefeasible title against the world under s. 132 of the Sarawak Land Code in the absence of fraud.

**[3]** The fact that the plaintiff knew of the circumstances alleged does not necessarily indicate or suggest that it had actively and deliberately encouraged the defendants to enter into the Sale and Purchase Agreements with the developer. No fraud can rationally and reasonably be inferred from such circumstances. Indeed on the evidence as disclosed in the affidavits, no fraud or collusion can be found on the part of the plaintiff. And even if there was fraud on the part of the registered co-proprietors and/or the developer, there is not a scrap of evidence that the plaintiff was a party to such a fraud.

*[Application allowed with costs. Caveat ordered to be removed].*

**Cases referred to:**

*Hajah Rajiah bte. Man v. Tai Cheng Finance Bhd.* [1987] 2 CLJ 154 ***(foll)***

*Malayan United Finance Bhd. v. Tay Lay Soon* [1991] 2 CLJ 899 / [1991] SCR 105 ***(cit)***

*Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 ***(foll)***

*Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 ***(dist)***

*Supreme Finance (M) Bhd. v. Chandan Daya Sdn. Bhd. & Peggy Mavis Moreira (Intervenor)* [1991] 1 CLJ 386 ***(foll)***

*Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 225 ***(foll)***

*Saminathan v. Pappa* [1981] 1 MLJ 121 ***(cit)***

*P.J.T.V. Denson (M) Sdn. Bhd. & Ors. v. Roxy (M) Sdn. Bhd.* [1980] 2 MLJ 136 ***(cit)***

*Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 CLJ 183 / [1983] 1 MLJ 81 ***(foll)***

**Legislation referred to:**

National Land Code 1965, s. 327

Sarawak Land Code (Cap. 81) ss. 113, 115, 132, 177(1)

*For the plaintiff - Ting Sing Chua; M/s. Yong & Wong*

*For the 1st defendant - Unrepresented*

*For the 2nd defendant - Stephen Chung; M/s. Stephen, Robert & Wong*

**JUDGMENT**

**Steve L.K. Shim J.**

By originating summons dated 10 November 1992, the plaintiff has, pursuant to s. 177(1) of the Sarawak Land Code (Cap. 81), applied for an order to remove the joint caveat lodged by the defendants and which was registered at the Sibu Land Registry on 13 September 1991 as Instrument No. L.8157/ 1991 affecting sublots 126 and 128, each containing 174.2 square metres, more or less together with the building thereon comprised in Sibu Lease of Crown Land No. 40325 situate at Sungei Seduan Sibu. The application is supported by the affidavit of Lutfiah bte Ismail, a legal officer of the plaintiff affirmed on 31 October 1992. The defendants are resisting the application, filing in support the affidavits in opposition of Ting Pik King and Ting No Miu affirmed on 21 January 1993 and 28 January 1993 respectively.

The facts as disclosed in the affidavits filed by the parties in dispute can be briefly stated herein. On or about 17 June 1988, the registered co-proprietors of the land described above entered into a Development Agreement with Grandhill Construction Development Sdn. Bhd. (the developer) wherein they appointed the developer *inter alia* to subdivide the said land into 41 sublots and to develop the land into a residential housing estate. On or about 18 September 1990, the registered co-proprietors entered into a Supplementary Agreement with the developer whereby it was agreed *inter alia* that the developer shall be allotted certain sublots including sublots 126 and 128. It was further agreed therein that the developer shall be entitled to enter into any arrangements for the sale of the sublots in question. On 16 August 1991, a Memorandum of Charge over the land was created by the registered co-proprietors in favour of the plaintiff in consideration of the plaintiff granting the developer a bridging loan of RM800,000. The Memorandum of Charge was registered with the Sibu Land Registry as Sibu Instrument No. L.7212/1991. On or about 10 September 1991, the developer entered into separate Sale and Purchase Agreements with the defendants, in relation to sublots 126 and 128. On the same date, the defendants lodged a joint caveat over the sublots and this was registered with the Sibu Land Registry as Sibu Instrument No. L.8157/ 1991. Subsequently, when the registered co-proprietors as chargors and the developer as borrower defaulted in payment of the loan, the plaintiff through its solicitors, brought an action by way of originating summons for auction sale of the land to satisfy, *inter alia*, the sum of RM459,824.44 with interest thereon at 12.5% per annum from 1 July 1992 to date of settlement. On 4 September 1992, the plaintiff wrote to the defendants requesting the withdrawal of the caveat but this was not acceded to. Hence, the application dated 10 November 1992 by the plaintiff to remove the said caveat.

The application, as I have said, is under subsection (1) of s. 177 of the Sarawak Land Code. That subsection simply states that any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged, may at any time, apply to the High Court for an order that the caveat be removed. It is not disputed that the plaintiff is a registered chargee of the land in question and so it would be in the position of a registered proprietor of an interest therein: see ss. 113 & 115 of the Code. As such, it would have a registered title to rely on as *prima facie* evidence of its right to the land: see *Hajah Rajiah bte Man v. Tai Cheng Finance Bhd.* [1987] 2 CLJ 154. It seems clear that the main thrust of the plaintiff's case relates essentially, if not solely, to the issue of the indefeasibility and priority of the plaintiff's charge over the caveat lodged by the defendants. In this connection, Mr. S.C. Ting for the plaintiff, has relied on s. 132 of the Code which stipulates:

> (1) Subject to the provisions of this Code, the registered proprietor of any estate or interest in land to which this section applies shall, except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest except -
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> (a) the estate or interest of a proprietor included in the Register in priority to

the title under or through which the first mentioned registered proprietor claims, being an estate or interest to which this section applies;

(b) as regards any portion of land included in the issue document of title by virtue of a wrong description:

Provided that this exception shall not apply if the registered proprietor is a purchaser in good faith and for value of the portion of land affected or derives title through such a purchaser;

(c) the implied conditions, obligations and restrictions referred to in s. 32;

(d) the interest of a tenant in possession of land for a term not exceeding one year;

(e) any change affecting the land under any written law; and

(f) any easement lawfully created and subsisting on 1 January 1958, or at such later date when the estate or interest affected by such easement becomes included in the Register.

(2) This section shall apply to any estate or interest in land included in the Register, other than an estate or interest included in a previous register under the former Land Ordinance and included in the Register by reason only of subsection (2) of s. 112.

He has also relied on the Supreme Court case of *Malayan United Finance Bhd. v. Tay Lay Soon* [1991] SCR 105 where the brief facts as they appear in the head-note state that the registered proprietor of two parcels of land, in consideration of a loan advanced to it by MUI Finance (appellant), executed a charge of the said land in favour of the appellant. Five years later, the registered proprietor entered into some negotiations with the respondent for the sale of the land which had already been charged to the appellant. Though no formal contract was concluded between the parties, the respondent alleging that there was a binding agreement for the sale and purchase of the said land, entered two private caveats against the land. The respondent subsequently instituted an action against the registered proprietor for specific performance of the contract and for damages. Meanwhile, in default of the repayment of the loan by the registered proprietor, the appellant instituted the necessary foreclosure proceedings to enforce the charge. The appellant then gave notice to the respondent to remove the caveats and subsequently applied to the High Court for the removal of the caveats. The registered proprietor also applied for the removal of the two caveats. The respondent, in resisting the applications, asserted that he had a caveatable interest in the said land by virtue of the alleged sale and purchase agreement between him and the registered proprietor. The High Court dismissed the applications on the ground that the respondent as caveator had satisfied the Court that both in fact and in law there were serious issues to be tried in relation to the contract of sale of the charged land and that on balance of convenience it would be better to maintain the *status quo* until the trial of the action instituted by the respondent for specific performance. The appellant appealed to the Supreme Court. The main question considered by the Supreme Court was the question of priority and indefeasibility of the charge. In the course of his submission before me, Mr. S.C. Ting has drawn particular attention to the following passage wherein Mohd. Jemuri, SCJ. (as he then was) stated *inter alia*:

> What appears to have preoccupied or troubled the mind of the learned Judge which made him feel constrained to make that remark as well as those in the last two paragraphs of his judgment and dismiss the appellants' application is the decisions in *Eng Mee Yong* and *Macon Engineers* which decided that in an application for the removal of a caveat, the caveator must satisfy the Court both in fact and in law that his claim is not frivolous or vexatious and that on the balance of convenience it would be better to maintain the *status quo* until the disposal of the action. With all respect, to apply such considerations in the context of the appellants' case obscures the real and crucial issue before the High Court. The cursory disposal of the issue by merely citing the authority of *Eng Ah Mooi* does not in our view resolve the issue but rather postpone it. It may be necessary to recapitulate that as between the appellant and the respondent both in the High Court and before us the pivotal issue is the indefeasibility and priority of the charge over the caveats on the part of the appellant and the right of the respondent, in the respondent's own words, to redeem the charge on the part of the respondent.

In the event, the Supreme Court, in allowing the appeal, ordered the caveats be removed because the charge registered in favour of the appellant, the chargee, was indefeasible and ranked in priority over the caveats lodged by the respondent, the subsequent purchaser. It should be noted that the respondent caveator had maintained that he had caveatable interest in the property by virtue of the sale agreement but the Supreme Court took the stand that the pivotal issue as between the appellant and the respondent, was the indefeasibility and priority of the charge over the caveats. In the course of consideration, the Supreme Court approved the dictum of Gill CJ. in *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53:

> Coming now to the second question as to whether the subsequent interest of the appellants overrides the earlier right of the respondent, the basic rule at law, as in equity, is that estates and interests primarily rank in the order of creation. *Qui prior est tempore potior est jure:* he who is earlier in time is stronger in law. Where there is a system of registration of titles to land the one who succeeds in the scramble to get on the register emerges victorious.

In the instant case, the charge executed by the registered co-proprietors in favour of the plaintiff was not only first in time but it was duly registered with the Land Registry. This was done before the defendants lodged their joint caveat. The sale and purchase agreements between the developer and the defendants were made subsequent to the creation or execution of the charge in question. In the premises, the dictum of Gill CJ in *Macon Engineers* would clearly apply in favour of the plaintiff in this case.

In resisting the application, Mr. Stephen Chung for the 2nd defendant has referred to the Privy Council case of *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 wherein Lord Diplock, in dealing with an application for the removal of a caveat under s. 327 of the National Land Code, said *inter alia*:

> ... he (caveator) must first satisfy the Court that on the evidence presented to it, his claim to an interest in the property does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

In the light of the above principle, Mr. Chung contends that by virtue of the Sale and Purchase Agreements entered into between the defendants and the developer acting as agent of the registered co-proprietors, the defendants have a caveatable or beneficial interest in the land. According to him, the defendants had purchased from the developer sublots 126 and 128. They had each paid part of the purchase price amounting in total the sum of RM135,000. They had commenced action against both the registered co-proprietors and the developer for damages for breach of contract. He therefore submits that the defendants' claims have raised some serious questions to be tried and that on balance of convenience, it would be better to maintain the *status quo* until the trial of the action. It would appear that the "action" referred to relates to a civil suit registered in the High Court Sibu as Suit No. 8 of 1993. This is reflected in paragraph 21 of the affidavit of Ting No Miu, a director of the 2nd defendant, which states as follows:

> The defendants have issued a Writ in the High Court at Sibu being Suit No. 8 of 1993 against the developer as the 1st defendant and against the registered co-proprietors as the 2nd, 3rd, 4th, 5th & 6th defendants *inter alia* for a declaration that we are the beneficial owners of sublots 126 and 128 in the said land; a declaration that the developer and the registered co-proprietors of the said land hold sublots 126 and 128 as trustees for and on our behalves and a declaration that we are entitled to share in the proceeds of sale in the event of the said land being sold.

It must be noted that in *Eng Mee Yong*, the appellants who applied for the removal of the caveat lodged by the respondent, were in fact the registered proprietors or landowners of the land. They had agreed to sell the land to the respondent but they subsequently terminated the sale agreement. In our case, the application for

removal of the caveats came from the plaintiff who was the chargee of the land. There is nothing to indicate or suggest that the plaintiff was a party or privy to any of the Sale and Purchase Agreements entered into between the developer and the defendants, assuming for the moment, that the developer was, at all material times, an agent of the registered co-proprietors of the land by virtue of the power of attorney executed in pursuance to the Development Agreement dated 17 June 1988. In this connection, it is, I think, pertinent to refer to the observation made by Lim Beng Choon J. in *Supreme Finance (M) Bhd. v. Chandan Daya Sdn. Bhd. & Peggy Mavis Moreira (Intervenor)* [1991] 1 CLJ 386 when he said *inter alia*:

> In addition I must also bear in mind the legal principle governing the rights of a purchaser of land pending the registration of the transfer of the land to him under the National Land Code. In *Bachan Singh v. Mahinder Kaur & Ors.* [1956] MLJ Thomson J. observed at pp. 97 - 98:
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> > To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *as rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code.
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> This observation of Thomson J. was cited with approval by our Federal Court in *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 225 @ 229.

In *Ong Chat Pang*, Gill FJ. stated that the plaintiff as a purchaser did not obtain an equitable title to the land by virtue of the sale agreement but he would have obtained an equitable interest of a contractual nature in the land which he could protect by a restrictive entry in the Land Register; that in short, he had acquired a caveatable interest in the land. In line with that observation, Lim Beng Choon J. in *Supreme Finance*, held that the intervenor, who was the purchaser of the land, had merely acquired an equitable interest of a contractual nature in the land as against the defendant chargor but that such interest was no good against the plaintiff chargee. He took the view that the sale and purchase agreement executed between the intervenor purchaser and the defendant chargor did not and could not create an incumbrance in the land since the right of the intervenor was an equitable interest of a contractual nature in the land which only afforded him a caveatable interest. He finally concluded that the plaintiff being a registered chargee, had attained an indefeasible title against the world.

I would adopt the same approach in the instant case, where as regards the Sale & Purchase Agreements executed between the developer and the defendants, the latter would merely have an equitable interest of a contractual nature in the sublots as against the developer and/or the registered co-proprietors but certainly not as against the plaintiff. The plaintiff being a registered chargee of the land in question and being in the position of a registered proprietor of an interest therein, would have attained an indefeasible title against the world under s. 132 of the Sarawak Land Code in the absence of fraud.

Now, in pleading fraud, the onus is upon the person alleging fraud to prove it not on the balance of probabilities but beyond reasonable doubt: see *Saminathan v. Pappa* [1981] 1 MLJ 121. As to what constitutes fraud, I need merely cite a passage in the judgment of Raja Azlan Shah CJ in *PJTV Denson (M) Sdn. Bhd. & Ors. v. Roxy (M) Sdn. Bhd.* [1980] 2 MLJ 136 when he said *inter alia*:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, that is, dishonesty of some sort' for which the registered proprietor is a party or privy. Fraud is the same in all Courts, but such expressions as 'constructive fraud' are ... inaccurate; but

'fraud ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled ... Thus in *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...

This passage was cited with approval by Abdul Hamid FJ. (as he then was) in *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81. The facts therein are quite significant in relation to our case and should therefore be worth setting out in some detail. There, the registered proprietress of a piece of land in Ipoh executed two separate charges over the land in favour of the appellant, a finance company. Both charges were registered. Payment of the loans was demanded by the appellant and on failure to comply, the appellant as chargee applied for an order for the sale of the land. The registered proprietress as chargor was also a developer and she had entered into an agreement with each of the 2nd to 7th respondents to build houses for them. The agreements were made some years before the charge was executed in favour of the appellant. When the respondents subsequently became aware of the said charge, they lodged caveats over the land. The respondents, not unnaturally, opposed the appellant's application for sale. The learned trial Judge dismissed the application holding that the appellant had not carried out sufficient investigations into the nature of the land; that if it did, it would have discovered that the buildings on the land had been sold to the respondents; that the appellant had constructive notice of the respondents' interest in the land as at the time the charge was executed, the chargor was bound by contract to sell the land to the respondents. The learned Judge held the appellant's demand for sale of the land in the face of such notice was unconscionable and constituted a fraud on the respondents. The appellant appealed against the dismissal. In the course of consideration, the Federal Court held *inter alia:*

(1) that the essential question which must be determined was whether the appellant was a party or privy to any fraud the chargor was guilty of; this being a question of fact. The onus was upon the respondents to prove fraud beyond a reasonable doubt;

(2) that to constitute fraud, the Court must be satisfied that the circumstances in which the appellant obtained registration of the charge were such that they constituted fraud. The onus was on the respondents to establish that there was actual fraud as opposed to constructive or equitable fraud on the part of the chargor to which the appellant was a party or privy and that it was committed prior to or at the time of registration of the charge.

The emphasis of the Court is clear, namely that: to render the interest of the registered owner of the charge defeasible, the fraud must be brought home to him. In the event, the Court held that there was no evidence to establish fraud. In allowing the appeal, the Court ordered the caveats to be removed accordingly.

In the light of the facts, findings and observations in *Tai Lee Finance,* what is the position in our case? Here, there is no express or specific allegation of fraud against the plaintiff. However, Mr. Chung has submitted, that in making the application to remove the caveat, the plaintiff did not come "with clean hands" as he put it, contending that the overall conduct of the plaintiff tended to show there was perhaps collusion bordering on fraud between it and the registered co-proprietors and developer prior to the execution of the charge in question. He contends that the plaintiff had actively and deliberately encouraged the purchasers including the defendants to enter into Sale and Purchase Agreements with the developer. This, according to him, is because the plaintiff knew, at all material times, that the primary purpose of the charge was to secure a loan to develop a housing estate consisting of 41 units of houses which would be sold to third parties and that it was quite reasonable and conceivable for the plaintiff to have expected that those who had purchased the units, would lodge

caveats to protect their equitable interests in the land. I do not think such proposition holds much water. In my view, the fact that the plaintiff, knew of the circumstances alleged, does not necessarily indicate or suggest that it had actively and deliberately encouraged the defendants to enter into the Sale and Purchase Agreements with the developer. No fraud can rationally and reasonably be inferred from such circumstances. Indeed on the evidence as disclosed in the affidavits, I can find no fraud or collusion on the part of the plaintiff. And even if there was fraud on the part of the registered co-proprietors and/or the developer, there is not a scrap of evidence that the plaintiff was a party to such fraud: see *Hajah Rajiah bte. Haji Man v. Tai Chang Finance Bhd. supra.*

In the circumstances and for the reasons given, I hold that as between the plaintiff and the defendants, there are no serious questions to be tried. No balance of convenience has been shown. The defendants' remedy, if at all, must lie against the developer and/or the registered co-proprietors. Undoubtedly, the plaintiff is the first and only registered chargee of the land namely sublots 126 and 128. As such it has an indefeasible title to the land. The registered charge of the plaintiff is also ranked in priority over the joint caveat lodged by the defendants. In the premises, the plaintiff is entitled to have the said caveat removed and I so order. Cost of this proceeding be given to the plaintiff.

**PUBLIC PROSECUTOR**

**v.**

**IBRAHIM BIN ARIFIN**

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL TRIAL NO. 47-17-91]
27 FEBRUARY 1993

***DANGEROUS DRUGS: Charge of trafficking in cannabis - Whether plant material seized was cannabis - Section 2 Dangerous Drugs Act 1952 - Whether resin had been extracted from plant material - Evidence of chemist - Whether chemist had done quantitative test to show non-extraction of resin.***

The Accused was charged with trafficking in a dangerous drug, to wit cannabis weighing 256.51 grammes, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

The question that arose was whether the prosecution had succeeded in proving an essential element of the charge, namely that the plant material seized from the Accused was cannabis as defined under the definition in s. 2 of the Act.

Two further questions arose for determination, namely whether the prosecution was justified in witholding the police report of the police officer who apprehended the Accused from the defence and whether at the close of the prosecution case, the prosecution was under a duty to make available witnesses for the defence.

**[Ed. Note:** The following paras of the headnote were provided by His Lordship Vincent Ng Kim Khoay JC]

**Held:**

**[1]** The complete removal of the original provision in s. 113(1) of the Criminal Procedure Code by virtue of Act A324 has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.

**[2]** There is no justification for the refusal by the learned DPP to supply a copy of the police report to the defence on the ground that same is not a first information report or for any other reason; it being also, a public document by virtue of s. 35 of the Evidence Act.